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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

October Term, 1930.

No. 140.

JEWELL-LASALLE REALTY COMPANY, a corporation,
Appellant,

vs.

GENE BUCK, as President of the American Society of Composers, Authors, and Publishers, and LEO FEIST, INC., a corporation,
Appellees.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES.

THOMAS G. HAIGHT,
NATHAN BURKAN,
LOUIS D. FROHLICH,
E. S. HARTMAN,
MAURICE J. O'SULLIVAN,
Counsel for Appellees.

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BRIEF FOR APPELLEES.

Statement of the Case.

This action was brought by the appellees against the appellant in the United States District Court for the Western District of Missouri, and was based on an alleged infringement of a copyrighted musical composition.[1] An injunction and damages were sought. The copyright is owned by one of the plaintiffs and the other plaintiff has

[1] The appellees in the court below will hereafter be referred to as the plaintiffs and the appellant as the defendant.

the exclusive non-dramatic performing rights thereunder.[2] The bill of complaint contains several counts, but this case is concerned only with the seventh. The only other count involved in the decision of the District Court is the subject matter of case No 139, and is discussed in the brief which was filed in that case and in case No. 138.

The infringement alleged was that the defendant, by means of an *orchestra*, gave, without plaintiffs' consent, a public performance for profit of plaintiffs' copyrighted musical composition in a hotel which it owned and operated in Kansas City.[3] The infringement was not denied, and a decree for an injunction and statutory damages of $250 was awarded plaintiffs.[4] There was no proof of actual damages or profits.[5] It was the defendant's contention in the courts below that the plaintiffs were entitled to only $10 statutory damages, while plaintiffs contended that $250 was the minimum which the Court could allow. The District Court agreed with the plaintiffs.[6] The Circuit Court of Appeals for the Eighth Circuit has certified the question or questions thus presented to this Court.

The precise questions certified are set forth on page 3 of defendant's brief and on page 9 of the Certificate, and will not be here repeated.

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[2] Cert. pp. 2 and 3.
[3] Cert. pp. 8, 3.
[4] Cert. p. 8.
[5] Cert. p. 8.
[6] 32 Fed. (2) 366, 368.

SUMMARY OF ARGUMENT.

(1) The decision of this Court in *Westermann Co.* v. *atch Printing Company*, 249 U. S. 100, controls this and requires that, in the absence of proof of actual ages suffered by a copyright proprietor or the profits ized by an infringer, the Court must award, as a mini-, damages of $250.00 for a single infringing perform- of a copyrighted musical composition. Although that sion did not deal with the infringement of the perform- rights in a copyrighted musical composition, yet the con- ction which this Court there gave to Section 25 (b) of Copyright Act of 1909 in respect to the damages to be wed for the kind of infringement involved in that case essarily applies to infringing performances of copy- ted musical compositions. The statute makes no dis- tion between the two kinds of infringement as to the mum and maximum statutory damages which must be wed. The reasoning of this Court is as applicable to one as to the other.

(2) The lower Federal Courts have consistently con- ed Section 25 (b) in respect to the minimum statutory ages which must be allowed for infringing perform- s of copyrighted musical compositions, the same as we end that the decision of this Court in the *Westermann* requires. Three Circuit Courts of Appeals and ten rict Courts, whose decisions have been reported, have eld. A certiorari has been denied in one case. This truction has prevailed since 1918 and Congress has not nged the statute.

(3) From the foregoing it follows that Question II ld be answered in the affirmative; and that Question III ld be answered in the negative unless the total number nfringements equal or exceed 25, and in the affirmative ey do equal or exceed that number so that at $10.00 , the total damages to be awarded shall not be less than 0.00.

(4) The clause of Section 25 (b) quoted in Question IV covers all cases for which that section provides maximum statutory damages, whether such cases come under the "no other case" clause or are those for which maximum damages are specifically provided. Hence Question III should be answered in the negative.

ARGUMENT.

I.

THE DECISION OF THIS COURT IN WESTERMANN COMPANY V. DISPATCH PRINTING COMPANY, 249 U. S. 100, CONTROLS THIS CASE, AND REQUIRES, THAT IN THE ABSENCE OF PROOF OF ACTUAL DAMAGES SUFFERED BY A COPYRIGHT PROPRIETOR OR OF THE PROFITS REALIZED BY AN INFRINGER, A COURT MUST AWARD AS A MINIMUM, DAMAGES OF $250.00 FOR A SINGLE INFRINGING PERFORMANCE OF A COPYRIGHTED MUSICAL COMPOSITION.

Section 25 (b) of the Copyright Act of 1909,[7] which is quoted in full in defendant's brief, provides that a copyright proprietor shall be entitled for an infringement of his copyright, among other remedies, to recover the damages that he may have suffered from the infringement, as well as the profits which the infringer shall have realized, or "in lieu of actual damages and profits such damages as to the court shall appear to be just", with certain maximum and minimum limitations. This section was construed by this Court in *Westermann Co.* v. *Dispatch Printing Co., supra.*[8] In that case, a newspaper had infringed by publishing certain copyrighted pictorial illustrations of styles in women's apparel. There was no proof of actual damages sustained

[7] Title 17, U. S. Code, p. 87.

[8] The Section as quoted in the opinion in the *Westermann* case was amended by the Act of August 24, 1912, Chap. 356, 37 Stat. at L. 488; but, so far as the point now under discussion is concerned, the amendment was of no moment as it simply provided certain specific maximum and minimum damages for particular infringements which are not involved in this case and which were in addition to those originally enumerated.

by the plaintiff or of the profits which the infringer had realized. One of the two questions before the Court was—What were the minimum statutory damages that a court could allow under these circumstances for each infringement? The Circuit Court of Appeals for the Sixth Circuit had held[9] that the minimum was $250. In affirming that Court on this point, this Court, speaking through Mr. Justice VAN DEVANTER, said (p. 106):

> "On the question of the amount of damages to be awarded for each case we are in accord with the circuit court of appeals. Both parties recognize that, *under the proofs,* the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. *There is no uncertainty as to what that measure is or as to its limitations.* The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule; and finally, that *in no case* shall they be more than $5,000. nor less than $250., except that for a newspaper reproduction of a copyrighted photograph they shall not be more than $200. nor less than $50. In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement, and the like, is made the measure of the damages to be paid, but with the express qualification that *in every case* the assessment *must be within the prescribed limitations;* that is to say, neither *more than the maximum nor less than minimum.* Within these limitations the

[9] 233, Fed. 609.

court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them." [10]

It is quite as difficult to perceive how the meaning of Section 25 (b) could have been more clearly expressed, as it is to understand how there can be any doubt that the interpretation so given to it applies to the minimum damages which must be allowed in *all* cases within its purview. The "appended schedule" referred to in the opinion is, of course, the four concluding paragraphs of the section, designated as "First", "Second", "Third" and "Fourth". The application of Section 25 (b) to the cases where the copyright in a musical composition has been infringed by public performance thereof for profit, in the light of the *Westermann* case, seems to be entirely clear and free from doubt, *i. e.*, if no actual damages or profits are proven, the Court may, in its discretion, allow for every infringing performance of the same composition $10 (the amount specified in Paragraph "Fourth") but the total amount thus allowed shall not exceed the sum of $5,000, nor be less than $250. How could anything be plainer? While the *Westermann* case dealt with the infringement of a copyright in a pictorial illustration, the interpretation which this Court gave to the statute in that case must necessarily apply to the infringement of the performing rights in a copyrighted musical composition. There is no *specific* minimum and maximum provided for in respect to an infringement either of a pictorial illustration or of the performing rights in a musical composition, such as there is for the infringement of a copyrighted photograph by newspaper reproduction, or of dramatic and non-dramatic works by

[10] Italics ours.

motion pictures. Each comes within the "no other case" clause of the Section. In Paragraph "Second" of the schedule, as pointed out in the opinion in the *Westermann* case,[11] there is a specific provision as to what the Court *may* allow, in determining what damages "shall appear to be just", for every infringing copy "made or sold by or found in the possession of the infringer". In Paragraph "Fourth" of the schedule, there is a similar provision as to what the Court *may* allow for every infringing performance of a musical composition. Consequently, there is no conceivable reason why the minimum and maximum limitations provided for in the "no other case" clause of Section 25 (b), which this Court has held applies to the infringement of a pictorial illustration, should not likewise apply to the infringement of the performing rights in a copyrighted musical composition. The statute does not differentiate between them. On the contrary, the "no other case" provision unquestionably, if effect is to be given to clear and explicit language, must be held to cover *all cases* enumerated in the statute where a different minimum and maximum is not provided.

It is contended by the defendant that this Court did not, in the *Westermann* case, consider the infringement there in question as coming within the provisions of Paragraph "Second" of the schedule and that the Court "had no occasion to decide whether the four sub-paragraphs, or any of them, were regulated or controlled by the 'no other case' clause". This is clearly incorrect. It is stated in foot-note 2 of the opinion that " 'prints and pictorial illustrations' are among the copyrightable works enumerated in Section 5", and Paragraph "Second" specifically provides that in the case of any work enumerated in section "five" (except

[11] See Footnote No. 2.

a painting, statue or sculpture), the Court may award as damages $1 for every infringing copy. Pictorial illustrations were the subject matter of that suit. As this Court held the infringer to be within the "no other case" clause and, as it was recognized that the infringer was likewise within Paragraph "Second" of the schedule, there is no justification whatever for defendant's assertion that the Court had no occasion to decide whether any of the four paragraphs of the schedule were controlled by the "no other case" clause.

It is urged[12] that, if this Court had considered Paragraph "Second" of the schedule to be controlled by the "no other case" clause, then it should have allowed not the minimum of $250, but the maximum of $5,000, because 30,000 copies of the infringing illustration had been made. This contention overlooks, however, that the Court is permitted "in lieu of actual damages and profits" to allow "such damages as to the Court shall appear to be just" and that, in assessing such damages, it "*may* in its discretion *allow the amounts stated in the respective schedules*". It is not *required* to do so.

It is also urged by defendant[13] that the construction which the *Westermann* case gave to Section 25 (b) cannot be applied to the infringement of a musical composition by public performance because, in that event, the statute would become "inconsistent with itself". The argument seems to be that each public performance of the same copyrighted musical composition is a separate and distinct infringement and would require a minimum of $250 to be allowed as damages for each performance, and that, therefore, if the "no other case" provision is applicable to such infringements, Paragraph "Fourth" of the schedule could apply only

[12] Point 3 of defendant's brief, p. 14. [13] Point 5 of defendant's brief, p. 30.

where the proprietor of a public place had the same selection played to the same people on the same occasion more than 25 times. Presumably, 25 times is taken so that at $10 a performance the total would be $250. This argument, as in the case of the one just referred to, fails to take into account that the statute leaves the amount of the statutory damages to be awarded for a *series* of separate infringements of the same copyright, as well as for *one* infringement, to the discretion of the judge, and provides that he *may* allow $10 for each infringing performance, no matter how many there may be, provided that the minimum amount of such damages awarded against the same infringer shall not be less than $250 nor more than $5,000.

Defendant's brief reviews the legislative history of the remedial special provisions of the Copyright Acts from the first of such acts down to the Act of 1909 and contends that, as a result thereof, the "no other case" clause of Section 25 (b) was not intended to apply to "infringing performances". The argument is rather involved, but, as we understand it, it is in brief this: Section 25 (b) was a consolidation of Sections 4965 and 4966 of the Revised Statutes,—the former being of a penal nature and the latter remedial; that the new section removed the penal character as to cases formerly coming within Section 4965; that there is no language indicating an intention to impose the total maximum and minimum limitations of the penal Section 4965 to cases coming within old remedial Section 4966 (which provided *damages* for infringement of the performing rights in dramatic and musical compositions); and that a contrary intention appears from the report of one of the Committees of Congress at the time the bill was under discussion.[14] The obvious answer to this argument is that Sec-

[14] This latter report is quoted on page 29 of defendant's brief.

tion 25 (b) of the Act of 1909 was a codification, and, if it had been the intention of Congress to have the maximum and minimum of the "no other case" clause of the section apply to infringements of the character specified in some of the paragraphs of the schedule and not to others, that intention would, of course, have been expressed. Defendant admits that Paragraph "Second" was a part of Section 4965 R. S., and, in its original environment, was subject to the maximum and minimum provisions. There is nothing in Section 25 (b) to indicate that the maximum and minimum provisions of that section should not apply to Paragraph "Fourth" of the schedule as well as to Paragraph "Second". As before pointed out, this Court has held in the *Westermann* case that cases falling within Paragraph "Second" of the schedule are subject to the maximum and minimum limitations of the section. The committee report referred to on page 29 of defendant's brief is in no way inconsistent with our position. Moreover, we think the contention of the defendant is clearly disposed of by what this Court said in the *Westermann* case. After reviewing the previous damage and penalty provisions of the Copyright Act, this Court said (p. 107):

> "In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the 'in lieu' provision now under consideration. *True, they were broadened so as to include* other *copyrights*, and the *limitations were changed in amount*, but *the principle on which they proceeded*—that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—*was retained.* The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just.' Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation." [15]

[15] Italics ours.

Finally, it is urged that if the statute be construed as requiring minimum damages for a single infringement of a copyrighted musical composition, it would attribute to Congress an intention "to extract unconscionable penalties in favor of private parties". This argument is fully answered by the Circuit Court of Appeals for the Sixth Circuit in *Westermann Co.* v. *Dispatch Printing Co.*,[16] where Judge DENNISON said:

> "The necessary effect of the provision is to prohibit the award of merely nominal damages. *This intent implies no undue harshness.* Not only does the typical copyright infringement, if not every one, involve indirect damages almost sure to be considerable, but in few cases would one sum of $250. more than compensate plaintiff for his time, trouble and expense in detecting, following up and prosecuting an infringement."

The reason for providing minimum statutory damages for infringements of copyrights is fully discussed in *Brady* v. *Daly*, 175 U. S. 148.

If an infringer could never be required to pay more than $10 as statutory damages for infringing the performing rights in a copyrighted musical composition, it requires no great imagination to appreciate that the incentive for infringement would be accelerated, because, in the very nature of things, the ascertainment of ordinary damages or profits in all but exceptional cases would be impossible and, if the copyright proprietor could only recover $10 for each infringement, the cost of seeking out, ascertaining and prosecuting infringers would be so vastly in excess of that sum and a reasonable counsel fee, that it could hardly be expected that any effort to prevent infringements would be undertaken.

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[16] 233 Fed. 613. (Italics ours.)

II.

THE LOWER FEDERAL COURTS HAVE CONSISTENTLY CONSTRUED SECTION 25 (b) IN RESPECT TO THE MINIMUM STATUTORY DAMAGES WHICH MUST BE ALLOWED FOR INFRINGING PERFORMANCES OF COPYRIGHTED MUSICAL COMPOSITIONS IN THE SAME WAY THAT WE CONTEND THAT THE DECISION OF THIS COURT IN THE WESTERMANN CASE REQUIRES.

Three Circuit Courts of Appeals have held (one of them twice) that the minimum damages which a court can allow for infringement of the performing rights in a copyrighted musical composition, where there is no evidence of actual damages, is $250. This Court has denied a writ of certiorari to review the holding of the last of these cases.

See:

Pastime Amusement Co. v. *Witmark*, 2 Fed. (2) 1020 (C. C. A. 4th Circuit);

Irving Berlin, Inc. v. *Daigle*, 31 Fed. (2) 832 (C. C. A. 5th Circuit);

Dreamland Ball Room, Inc. v. *Shapiro, Bernstein & Co.*, 36 Fed. (2) 354 (C. C. A. 7th Circuit);

Lutz v. *Buck*, 40 Fed. (2) 501 (C. C. A. 5th Circuit); Certiorari denied October 20, 1930 (282 U. S. —).

In addition, the following reported decisions in the District Courts are to the same effect:

Witmark v. *Pastime Amusement Co.*, 298 Fed. 470 (Dist. Ct., E. D., S. Ca.);

Waterson, Berlin & Snyder Co. v. *Tollefson*, 253 Fed. 859 (Dist. Ct., S. D. Cal., S. D.);

Remick v. *General Electric Co*, 16 Fed (2) 829 (Dist. Ct., S. D., N. Y.);

Witmark v. *Calloway*, 22 Fed. (2) 412 (Dist. Ct., E. D. Tenn., N. D.);

Fisher v. *Dillingham*, 298 Fed. 145 (Dist. Ct, S. D., N. Y.);

Buck v. *Heretis*, 24 Fed. (2) 876 (Dist. Ct., E. D., S. Ca.);

Buck v. *Lester*, 24 Fed. (2) 877; (Dist. Ct., E. D., S. Ca.);

Buck v. *Milam*, 32 Fed. (2) 622; (Dist. Ct., D. Idaho, E. D.);

Buck v. *Duncan*, 37 Fed. (2) 366 (Dist. Ct., W. D. Mo., W. D.);

Sauer v. *Detroit Times Co.*, 247 Fed. 687 (Dist. Ct., E. D., Mich., S. D.).

Only one District Judge has held to the contrary, and he was promptly overruled by the Circuit Court of Appeals for the Fifth Circuit in *Irving Berlin, Inc.*, v. *Daigle, supra.*

Defendant's brief [17] quotes extracts from the opinions of some of the lower court judges to the effect that "on the first reading" or "from a casual reading" of Section 25 (b) such judges were under the impression that $10 rather than $250 was the minimum that could be allowed for infringing the performing rights in a copyrighted musical composition. The first of these extracts is from the opinion of Judge BLEDSOE in *Waterson, Berlin & Snyder Co.* v. *Tollefson, supra.* In that case, however, he said, in addition:

> "However, *upon more careful study of the section* [18] and consideration of its various terms, and more particularly upon considering and reading the section as it appeared previous to its amendment in 1909, I am of the opinion that this is one of the 'other cases' referred to in clause 'b' of section 25, supra, and that the minimum damages to be awarded for the infringement shown should be $250.

[17] pp. 8 and 9. [18] Italics ours.

> The provision for an allowance of 'ten dollars' must be held to apply where a large number of infringements have been shown; this figure may be used by the court as a basis for its computation of the entire damages by assessing each infringement at $10., if such method of computation, under all the circumstances, 'shall appear to be just'; but in the event the total number of infringements, computed on the $10. basis, do not amount to $250., nevertheless, pursuant to the mandatory terms of the statute contained in the provision last above referred to relating to 'other cases', the court may not award damages in a sum less than $250. So, also, no matter how many separate infringements may be proved, no 'actual' damages being shown, the court may not mulct the defendant in damages in excess of the maximum sum mentioned, to wit, $5,000."

It will be noted that he reached the conclusion that the $250 was the minimum amount of statutory damages, before this Court had rendered its decision in the *Westermann* case.

Another extract is from the opinion of Judge COCHRAN in *Witmark & Sons* v. *Pastime Amusement Co., supra.* But Judge COCHRAN said in addition:[19]

> "But *a careful study of* the act in the light of the decision of the Supreme Court in *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100, convinced me that such is not the proper construction."
>
> * * * * * * *
>
> "When the statute is carefully studied in the light of this decision and the decision of the Circuit Court of Appeals in the same case (233 Fed. 609, 147 C. C. A. 417), the conclusion is irresistible that the proper construction of the section is that paragraphs 'first',

[19] At pp. 481-482.

'second', 'third', and 'fourth' may be resorted to by the court in cases to which these paragraphs respectively apply in assessing such damages as may appear just, but the court must in all cases assess such damages at not less than $250. nor more than $5,000., except where other specific provision is made in subdivision (b) itself."

The extracts from the dissenting opinion of Judge FOSTER in *Irving Berlin, Inc.* v. *Daigle, supra,* have no application to the question now under consideration, because the infringement complained of in that case was "the use of a phonograph record for a public performance for profit". Judge FOSTER was of the opinion that the provisions of Section 25 (e) of the Copyright Act, which relate to the damages that a copyright proprietor may recover under certain conditions for infringement by the unauthorized manufacture and sale of phonograph records, applied to the infringement complained of in that case.

It is, of course, significant that although the foregoing construction has prevailed since 1918, when Judge BLEDSOE decided *Waterson, Berlin & Snyder* v. *Tollefson, supra;* yet *Congress has not changed the statute.*

III.

THE CLAUSE OF SECTION 25 (b) QUOTED IN QUESTION IV COVERS ALL CASES FOR WHICH THAT SECTION PROVIDES MAXIMUM STATUTORY DAMAGES.

We are in accord with counsel for defendant in failing to perceive that an answer to Question IV is material to the decision of this case. The plaintiff did not ask for more than the minimum statutory damages, and hence, the question as to whether the Court in this case could have allowed more than $5,000.00 statutory damages, did not arise.

Nor are we entirely certain that we understand the question.

If, as we think, the inquiry is whether the clause quoted in the question is confined in its application to those infringements *specifically* referred to in Section 25 (b) as distinguished from those coming under "no other case" clause, then the question should be answered in the negative.

Section 25 (b) provides for statutory damages in *all* cases of copyright infringement where no actual damages or profits are shown, and therefore, "the limitation as to the amount of recovery" in the clause quoted in the Question IV, would seem unquestionably to apply to the infringements provided for in the "no other case" clause, as well as the *specific* infringements referred to in that section.

CONCLUSION.

It follows from the foregoing that the questions certified should be answered as follows:

(a) Question II should be answered in the affirmative.

(b) Question III should be answered in the negative, unless the total number of infringements equal or exceed 25; and in the affirmative if they equal or exceed that number, so that at $10.00 each the total damages to be awarded shall be $250 or more.

(c) Question IV should be answered in the negative.

Respectfully submitted,

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